

## TMA OFFICE OF THE GENERAL COUNSEL

March 26, 2020

### TMB RELEASES EMERGENCY RULES ON NON-URGENT SURGERIES AND PROCEDURES

*\*Disclaimer: The information relating to COVID-19 is continually evolving and the information provided here is subject to change at any time. Please contact the TMA Knowledge Center (contact information provided at the end) or view the appropriate agency's website for the most up-to-date information.*

On March 24, the Texas Medical Board (TMB or Board) [released](#) emergency rules on the provision of non-urgent, elective surgeries and procedures in inpatient and outpatient settings following Governor Abbott's [Executive Order GA-09](#).

**Importantly, please note that the Board's FAQs interpret the governor's order, as well as the Board's own emergency rule 22 T.A.C. 187.57, relating to permitted procedures that do not deplete hospital capacity or personal protective equipment (PPE) more narrowly than the language in the order and rule themselves. This is further explained in the subsection titled "Category Two: Procedures that do not deplete PPE or hospital capacity."**

More on the Board's rules and recently updated [FAQs](#) are discussed below.

#### ***Background***

The executive order, issued March 22, directed all licensed health care providers to postpone all surgeries and procedures that "are not immediately necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician." Failure to comply may result in penalties of up to \$1,000 or 180 days of jail time. The order is effective until April 21, 2020 and may be extended by the governor.

The purpose of the order is to preserve healthcare personnel, PPE, and to provide additional space to care for patients affected by the coronavirus (COVID-19). Accordingly, the governor caveated this directive by stating that "this prohibition shall not apply to any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster."

Attorney General Ken Paxton [stated](#) further that the order "applies throughout the State and to all surgeries and procedures that are not immediately medically necessary, including routine dermatological, ophthalmological, and dental procedures, as well as most scheduled healthcare procedures that are not immediately medically necessary such as orthopedic surgeries or any type of abortion that is not medically necessary to preserve the life or health of the mother."

## ***TMB Emergency Rules***

The TMB issued emergency rules on the enforcement measures they will take to support the governor's order in inpatient and outpatient settings. The two major enforcement changes are:

1. An **immediate, mandatory reporting** requirement for “any peer review committee, licensee, and other group, entity, or person” named in Sections [160.003](#), [204.208](#), [205.304](#), and [206.159](#) of the Occupations Code. These named individuals and entities must immediately report any physician “scheduling to perform, preparing to perform, performing, or who has performed a non-urgent elective surgery or procedure” to the Board. The mandatory duty to report applies regardless of any other statute, rule, or provision concerning reporting timing to the Board and regardless of whether “any type of proceeding, inquiry, investigation, or action of any kind is being considered, has been initiated, or is ongoing at a hospital, ambulatory surgical center, or any other facility or medical setting.” See [22 T.A.C. § 178.4\(d\)](#).
2. Performance of a “non-urgent elective surgery or procedure” is now considered a “continuing threat to the public welfare” and the Board’s disciplinary panel may hold a temporary suspension hearing with or without notice. The panel may also temporarily restrict or suspend a physician’s license if the panel determines a physician’s action violated this section. See [22 T.A.C. § 187.57](#). Note further that if a restriction or suspension occurs, even if temporary, the Board will report it to the National Practitioner Data Bank.

## ***The TMB FAQs***

The TMB also published [FAQs](#)<sup>1</sup> to assist physicians in determining what is considered an elective, non-urgent procedure or surgery and when such procedure or surgery can be performed in inpatient and outpatient settings while the executive order is in effect.

The Board defines non-urgent elective procedures or surgeries:

“Non-urgent elective cases are being defined as instances where **there is no anticipated short-term nor long-term negative impact** on the patient because of delaying a procedure or surgery. Examples include screening for a non-life-threatening, chronic condition<sup>2</sup> and most cosmetic procedures.”

(Emphasis added).

Non-urgent, elective procedures and surgeries are not permitted during the effectiveness of the governor’s order. However, a non-urgent, elective procedure does not include (and therefore the order permits performance of): (1) a surgery or procedure that is immediately necessary to correct a serious medical condition of, or to preserve the life of, a patient who would be at risk

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<sup>1</sup> Please continue to check the Board’s [website](#) for the most up-to-date information as information is constantly changing to address the impact of the coronavirus.

<sup>2</sup> But see the Board’s definition of “procedures,” included below, for context on what is considered a non-urgent, elective procedure.

for serious adverse medical consequences or death if the procedure or surgery did not immediately occur; or (2) a procedure, performed in accordance with the applicable standard of care, that will not deplete hospital capacity or PPE needed to fight COVID-19—however, please note, the Board added an additional qualification to this category that is not expressed in the governor’s order, which is explained below.

### **Category One: Immediately necessary surgeries or procedures**

To determine if a surgery or procedure fits in the immediately-necessary category, the Board provides the following three-step analysis for physicians to ask themselves before performing a medical act:

1. First, does the prohibition apply to the physician or the physician’s practice?
  - a. The order applies to all licensed health care providers and their delegates, as well as all licensed health care facilities, including hospitals, medical spas, and ambulatory surgical centers. This also includes a physician’s office if a surgery or procedure is being performed in violation of the order and the Board’s rules.
  - b. If a physician answers yes to this question, then the physician should proceed to question two.
2. Second, is the medical act a surgery or “procedure”?
  - a. The Board expressly states that a “procedure” does *not* include the following: physical examinations, non-invasive diagnostic tests, the performing of lab tests, or obtaining specimens to perform laboratory tests. Thus, these medical acts are outside the scope of the governor’s order. If a physician is performing one of these carved-out acts, the analysis ends and the physician may perform the medical act.
  - b. Otherwise, if the answer is yes, the physician should proceed to question three.
3. Third, does the medical act meet the “immediately necessary” two-part test:
  - a. Part One: Is this immediately medically necessary to correct a serious medical condition or to preserve the life of a patient? If yes, the physician moves to the second part below.
  - b. Part Two: Would this patient, without immediate performance of the surgery or procedure, be at risk for serious adverse medical consequences or death?

If the physician answers “yes” to these two questions, then the physician may proceed with the surgery or procedure. Otherwise, the medical act is prohibited under the governor’s order unless it fits within category two below.

### **Category Two: Procedures that do not deplete PPE or hospital capacity**

Another category of permissible procedures (keep in mind the Board’s limitation on the term “procedures”) under the governor’s order are procedures that, when performed in accordance with the commonly accepted applicable standard of care, would not deplete the hospital capacity or the PPE needed to cope with the COVID-19 pandemic. However, physicians should note that the Board added another requirement to this category in the FAQs which is not required by the governor’s order or by the Board’s own published emergency rule (22 T.A.C. 187.57(c)(2)): the

procedure must “**still** meet the criteria of being [immediately] medically necessary to prevent ‘risk for serious adverse medical consequences or death, as determined by the patient’s physician, regardless of the office, facility, local, regional, or state availability of PPE and hospital capacity.” Pursuant to this, a physician must meet the test above to perform the procedure. Whether or not the procedure impacts the depletion of hospital capacity or PPE used for COVID-19 is a non-factor under the Board’s FAQ if the procedure is not immediately medically necessary. Note also that even though FAQ No. 5 does not include the “immediately” language before “medically necessary,” the Board’s analysis in FAQ No. 19 implies that it is part of the analysis process in determining if the procedure can be performed in accordance with the governor’s orders and the emergency rules.

**TMA is seeking more clarity on the Board’s FAQs, its rules, and the governor’s order. In the meantime, if you have questions on this matter for your specific set of facts, please contact your retained attorney for legal advice.**

### ***Documentation***

The Board stresses that in these fact-specific cases, documentation is key. Specifically, the Board’s FAQs state:

“It is very important that the medical record clearly reflects why the elective surgery or procedure was necessary to prevent serious adverse medical consequences or death. This documentation could include information on the patient’s medical history, prescriptions, lab results, imaging, or other relevant factors used to help make the determination of the necessity of the surgery or procedure.”

For physicians who are being delegated tasks, documentation of the information communicated in accordance with the delegation is particularly important. And of course, if a physician feels a prohibited procedure or surgery is being planned, is being performed, or was performed, the physician should comply with the Board’s mandatory reporting requirement. Reporting under the emergency rule is immune from civil liability under Section 160.010 of the Texas Medical Practice Act (the Act), the prohibitions on discipline and discrimination under Section 160.012 of the Act also protect reporters.

### ***Medical Acts that are general permitted or prohibited***

The Board’s FAQs identifies the following surgeries or procedures that are generally prohibited under the order:

1. Screening for a nonlife-threatening chronic condition;
2. Most cosmetic procedures;
3. Routine dermatological procedures;
4. Routine ophthalmological procedures;
5. Routine dental procedures;

6. Non-emergent orthopedic surgeries<sup>3</sup>;
7. Most cosmetic and plastic surgeries;
8. Nonsurgical cosmetic procedures; and
9. An abortion not medically necessary to preserve the life or health of the mother.

The Board expressly identifies the following medical acts as permissible and outside the governor's order:

1. Office-based visits that do not require surgery or procedures (so long as conducted in accordance with standard protocols, including safety measures that prevent the spread of COVID-19); and
2. Non-procedures (as carved out by the Board's definition of "procedures") that involve:
  - a. physical examinations;
  - b. non-invasive diagnostic tests;
  - c. the performing of lab tests; or
  - d. obtaining specimens to perform laboratory tests.

### ***Additional Information***

Please remember that the Board's FAQs are intended to provide guidance—the FAQs are not law; however they reflect the Board's view on its enforcement authority and how it intends to apply its rules. Note also that the Board's guidance does not govern how the attorney general will enforce the governor's order. Other than the statement released from the attorney general linked to above, there is no additional information from the Office of the Attorney General at this time.

TMA will continue to update you on developments from the TMB regarding its rules and guidance. For a specific fact analysis under the new emergency rules and order, please contact your retained attorney for legal advice. For general questions on the rule and order, please contact the TMA Knowledge Center by email at [knowledge@texmed.org](mailto:knowledge@texmed.org) or by phone at (512) 370-1550

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<sup>3</sup> For this purpose, the Board defines emergent as: a life-threatening condition in which the surgery or procedure must be undertaken and/or cannot be safely delayed for any significant period of time. TMA will seek clarification and urge the Board to change this to "non-urgent," which is consistent with the Board's other FAQs.

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